OPINION AND AWARD

OF

DAVID S. PAULL

**In the Matter of the Arbitration Between**

# American Federation of State, County and Municipal Employees, Minnesota Council No. 5, Local Union No. 3937

**AND**

# University of Minnesota at Minneapolis, Minnesota

## (Heather H. Anderson, Grievant)

Issued October 10, 2006
BMS Case No. 06-PA-192

# O P I N I O N

## Preliminary Matters

The Arbitrator was selected by mutual agreement from a list provided by the Minnesota Bureau of Mediation Services. A hearing was conducted in Minneapolis, Minnesota, on Friday, July 21, 2006. The University of Minnesota ("University") was represented by Shelley Carthen Watson, Associate General Counsel. The American Federation of State, County and Municipal Employees, Minnesota Council No. 5, Local Union No. 3937 ("Union") was represented by Joyce Carlson, Union Representative.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. No court reporter was present. The Arbitrator tape-recorded the proceedings to supplement personal notes. After the witnesses were heard and the exhibits were presented, the parties submitted written closing statements. The closing statements were timely postmarked and received on or before August 31, 2006.

Thereafter, the Union objected to an appendix the University attached to its written closing statement. On September 9, 2006, the parties were notified that the objection would be resolved in the final decision. The parties were further invited to file simultaneous briefs on the issue, limited to 3 pages or less, postmarked on or before September 19, 2006. Timely supplemental statements of position were received from both parties on or before September 22, 2006.

Thereafter, the grievance was deemed submitted and the record closed.

## Issue

The parties agreed on a precise statement of the question to be resolved.

The issue, as formulated by the parties, is as follows:

> Did the University have just cause to discipline Heather H. Anderson on February 2, 2005, and if not, what is the appropriate remedy?

No issue of procedural arbitrability was raised.

# Relevant Contractual Provisions

## ARTICLE 22
## DISCIPLINE

SECTION 1. DISCIPLINE FOR JUST CAUSE Disciplinary action shall be taken only for just cause, however probationary employees may be discharged without just cause and shall have no right to grieve discharge (see Article 7, Probationary Period). Disciplinary action, except discharge, shall have as its purpose the correction or elimination of incorrect work-related behavior by an employee.

Supervisors may not take disciplinary action against an employee who, in good faith, reports a violation of any federal or state law or regulation to a government body or law enforcement official. Disciplinary action may not be taken against an employee who is requested by a public agency to participate in an investigation, hearing, or inquiry as well as an employee who refuses to participate in any activity that the employee, in good faith, believes violates state or federal law.

SECTION 2. COACHING The normal corrective disciplinary procedure shall consist of three (3) steps, except that initial minor work deficiencies will normally be privately brought to the employee's attention through coaching. Coaching may include, but is not limit to instructions, directions or prompting to the employee. Coaching provides feedback on job performance and in intended to be corrective and constructive. Coaching shall not be considered disciplinary.

SECTION 6. CORRECTIVE DISCIPLINARY PROCEDURE The normal corrective disciplinary procedure shall consist of three (3) steps, except that initial minor work deficiencies shall be privately brought to the employee's attention through coaching. Both parties agree that the order of discipline below is the progressive order of discipline; however, situations may arise where it will be appropriate to depart from this order.

A. An oral warning shall be given to the employee specifying the nature of any incorrect work-related behavior and pointing out that non-correction will result in further disciplinary action. Oral warning shall be documented by use of a standard University form that shall be sent to the department /administrative unit file with a copy provided to the employee.

B. A written warning shall be given to the employ specifying the nature of any continuing incorrect work-related behavior and pointing out that non-correction will result in further disciplinary action.

C. A notice of suspension shall be given to the employee with a written explanation specifying the nature of any continuing incorrect work-related behavior and pointing out that non-correction will result in further disciplinary action.

Discipline shall be documented in writing to the employee. Discipline beyond oral warning will be copied to the employee's official personnel file. The employee shall sign the disciplinary letter to acknowledge discipline has occurred and shall receive a copy of the disciplinary letter. However, refusal of the employee to sign the letter will not invalidate the disciplinary actions. Such letter shall include a statement of the rationale for the disciplinary action taken. A copy of the disciplinary letter will be provided to the Steward when written warning, suspension or discharge is involved.

## Summary of Facts

The Parties

The University of Minnesota (University) is the long established multi-campus public land-grant state university. The discipline challenged by this grievance was issued by a division of the University, the University Libraries at the Minneapolis campus. The parties stipulated that approximately 50,000 students attend classes at the Minneapolis campus during the school year.

The American Federation of State, County and Municipal Employees Council No. 5, Local Union 3937 (Union) is the exclusive representative for purposes of collective bargaining for persons employed in approximately 35 separate job classifications. The University and the Union are signatory to a collective bargaining agreement effective for the period beginning July 1, 2003 and ending June 30, 2005 (CBA). The parties agree that the CBA applies to the grievance.

The Grievant, Heather A. Anderson, is employed by the University as a Library Assistant. The record establishes that Ms. Anderson was first employed as a first level Library Assistant on August 21, 1995. She is currently classified as a Library Assistant III.

There is no evidence indicating that the Grievant was issued any discipline prior to February 2, 2005, the date of the discipline disputed by the parties. There is evidence that the Grievant was "coached" on several previous occasions, within the meaning of the CBA at Article 22, Section 2. Written employment performance evaluations are in evidence for annual periods beginning November 22, 1995 and ending April 30, 2002.

These evaluations indicate that Ms. Anderson's work performance over this period of time was satisfactory.

Email Exchange between the Grievant and her Supervisor

Ms. Anderson's immediate supervisor is her Library Manager, Fariha Grieme. On or about January 11, 2005, Ms. Anderson and Ms. Grieme exchanged several emails relating to the possibility and advisability of requiring some students to share certain computers for library activities, at least until additional equipment could be provided.

According to the testimony, the exchange began when Ms. Grieme sent an email to Ms. Anderson indicating that she might have to make arrangements for a group of students to share computer time with another group of students. Ms. Anderson was one of several "team leaders," overseeing the activities of students in her work area. In an email sent at 8:14 a.m., Ms. Anderson wrote, in pertinent part, as follows:

> You should have talked to me and Kim before you announced to the SAS team. It would have been wiser to have ask[ed] us if there were any problems with sharing before [you] told the world of your decision. Why would you assume that Kim's student had everything that she needed when you had an experienced employee pointing out to you that it was unlikely? Just because you haven't been around when all six students work at the same time doesn't mean it does not happen. I have been providing you with the student schedules . . . I demonstrated that I have been more than willing to share the workstations in the afternoons but I can't give away morning hours with[out] damaging the quality or timelines of the student serial work.

The testimony indicated that Mr. Grieme had previously emailed Ms. Anderson and remarked that she had not personally witnessed more than one student simultaneously requesting computer time or using a computer.

Ms. Grieme responded to Ms. Anderson's 8:14 email later that morning, at 9:24 a.m. "Sorry," Ms. Grieme wrote, "but this is as in advance as it gets . . . I have never seen more than one student working in the Book Room, so this was news to me too." Ms. Grieme also stated in this email that she understood Ms. Anderson's frustration "but things don't work as planned sometimes and we need to be understanding and accommodating without pointing [a] finger . . . If you have another solution , please let me know . . . And as I said, we will see if we can find another computer somewhere . . ."

At 1:12 p.m., Ms. Grieme again emailed Ms. Anderson. In this email, Ms. Grieme appears to be more specific about the circumstances that might require students to share a computer. She referred to a fellow employee who had "managed to find another computer that is not currently being used, but she may need it back . . . If that happens, the Serials [sic] students need to share until we can find another computer."

To this message, Ms. Anderson replied at 2:01 p.m. "Loved the advanced warning," Ms. Anderson wrote, "very considerate." Ms. Anderson also referred to a previous conversation in which she advised Ms. Grieme that "Kim would have to be responsible for getting her student a computer, chair and all other necessary equipment. . . Obviously, somebody dropped the ball there." In one of the email messages, Ms. Anderson requested that she be issued a letter relieving her of the duty to complete a certain aspect of her work because of a lack of equipment.

"Coaching" Conducted by Ms. Grieme

At the hearing, Ms. Grieme testified that she considered the nature and tone of Ms. Anderson's emails to be improper and disrespectful in tone. Subsequently, Ms. Grieme noticed that Ms. Anderson appeared to be unwilling to interact with her. When a work related issue arose requiring Ms. Anderson's input, she refused to participate. At a training session later that afternoon, Ms. Anderson again failed to respond to Ms. Grieme.

Perceiving that Ms. Anderson was angry and mindful of her email requesting that she be relieved of the duty to complete a certain aspect of her assigned responsibilities, Ms. Grieme decided to informally "coach" her concerning her recent behavior. Toward this end, Ms. Grieme approached Ms. Anderson and asked her to go on a break with her so they could talk. Ms. Grieme testified that she considered the proposed meeting to be an attempt at "problem solving" and not disciplinary in nature.

As the two walked toward the meeting area, Ms. Grieme asked Ms. Anderson if she was "panicking " about the prospect of her students not having enough computers. When Ms. Anderson replied in the affirmative, Ms. Grieme advised her that, in her opinion, this was a problem that might not even occur. Ms. Anderson commented on some of the duties of her job and about the daily noon deadline. She expressed concerns about what she perceived as the potential that Ms. Grieme might be underestimating current resources. At this time, Ms. Anderson again referred to Ms. Grieme's previous comment that she had not seen a full compliment of students working at the computers all day. Ms. Anderson explained to Ms. Grieme, that in her view, this was the same as calling her a "liar."

Subsequently, Ms. Grieme came to the point of the meeting and told Ms. Anderson that some of her work related behavior was being perceived by her and others as discourteous and sarcastic and that her emails were "rude" at times. During the conversation, Ms. Grieme suggested that in the future, if an event occurred that caused Ms. Anderson to become upset, that she should try taking a time out and "walk away from the situation."

Shortly thereafter, Ms. Anderson came to her feet and began to walk away. Ms. Grieme followed her and call out, stating that she still wanted to speak to her. In a hallway, Ms. Anderson turned toward Ms. Grieme and stated that she was "taking your advice and I'm removing myself from the situation."

Ms. Grieme recalls that, as she caught up to her, Ms. Anderson turned toward her and said that she was "removing herself" from the situation because "if she didn't, then this would happen." As she made this statement, according to Ms. Grieme, Ms. Anderson swung her clenched fist to within inches of Ms. Grieme's face. Ms. Grieme recalls saying "go ahead, do it," and then walking away. Ms. Grieme further recalls that Ms. Anderson thereafter turned sideways and threw her water bottle against the glass window in the corridor. The water bottle was produced for inspection at the hearing. The bottle appeared to be large, with a capacity of perhaps a quart or more.

There is no evidence that any student, professor, employee or member of the public was present in the area when the water bottle was thrown by Ms. Anderson.

The parties dispute certain aspects of what occurred. Ms. Grieme testified that she did not raise her voice during this exchange. According to Ms. Anderson, when Ms. Grieme continued to call for her attention, she "yelled at her ." Ms. Anderson

further testified that Ms. Grieme was angry during the conversation and called her name out "loudly" and "grinned" when she said "go ahead." Ms. Anderson contends that when she was discussing her emails, Ms. Grieme told her that she [Ms. Grieme] could be "as much as a bitch as me," implying that she was capable of exercising more control over her temper. Ms. Grieme denies using the word. Ms. Anderson recalls that she referred to the act of removing herself from the situation in a polite way. Ms. Grieme testified that she was substantially shaken after the event.

The Investigation

The task of investigating this incident was assigned to Linda Lomker, a supervisor in the University Library's Specialized Cataloging Section. Ms. Lomker testified that she confined her investigation to Ms. Anderson's action with her fist and the throwing of the water bottle. According to her testimony, neither the nature nor tone of Ms. Anderson's emails or the dispute over the equipment shortage was part of the investigation.

Ms. Lomker first met with Human Resources Director Linda DeBeau-Melting in order to confirm the proper procedure. She then identified the potential witnesses to the incident. She determined that there were three witnesses, including Ms. Anderson.

Ms. Lomker then interviewed all of the witnesses. Both Ms. Lomker and Human Resources employee Dana Langseth took handwritten notes at the interviews. Ms. Lomker reviewed her own notes and the notes of Ms. Langseth for accuracy. The formal written interviews were offered and accepted as evidence. On the advice of the Human

Resources Department, Ms. Lomker destroyed her handwritten notes after the documents were prepared in final form.

University of Minnesota Code of Conduct

The University maintains a Code of Conduct (Code) that applies to all "members of the University community." Included in this definition are all faculty and staff.

The Code requires that all members of the University "community" "adhere to the highest ethical standards of professional conduct and integrity. The Code defines professional behavior to include "honesty, trustworthiness, respect and fairness in dealing with other people, a sense of responsibility toward others and loyalty toward the ethical principles espoused by the institution."

The Discipline

On January 31, 2005, Ms. Anderson received a letter from Ms. Lomker, indicating the decision on discipline, a "one-day suspension from your job in the University Libraries." The suspension was served on February 2, 2005. "At the Investigatory meeting on January 19, 2005," the letter stated, "you admitted to raising your fist to your supervisor." The letter also referred to Ms. Anderson throwing her water bottle, thereby "endangering others." The letter further stated:

> Threatening your supervisor with physical violence and endangering the safety of students, the public, and other employees in a willful manner are serious actions. Non-correction of this behavior will result in further disciplinary action.

A grievance was filed by Union on Ms. Anderson's behalf on February 2, 2005.

## Positions of the Parties

The University

It is the University's central position that the discipline issued to the Grievant was supported by just cause because the Grievant (1) engaged in a verbal and physical outburst, (2) created a "hostile, threatening, and unsafe atmosphere" in the workplace and (3) created a liability for her employer.

In support of its position, the University first argues that the Grievant was on notice that such conduct was improper. A reference is made to the University's Code of Conduct, which is generally distributed to all employees. "The Code of Conduct illustrates that the University expects its employees to strive to create and maintain a respectful workplace," declares the University. Even in the absence of the Code, the University contends, the conduct engaged in by the Grievant was wrong and cannot be tolerated.

Next, the University discusses the investigation. The University points out that the investigator consulted with the Director of Human Resources to confirm the proper steps to take. She identified the potential witnesses, contends the University, and familiarized herself with the appropriate principles. She interviewed the witnesses and asked proper questions. A written report was issued and, "at the advice of Human Resources," the handwritten notes she made during the interviews were destroyed upon completion of the formal investigative report. The University refers to testimony indicating that the investigator reviewed all relevant evidence, including the emails that started the whole sequence of events rolling."

The University further notes that the investigative summary was presented to the Grievant and the Union on January 26, 2005. "Neither the Grievant nor [anyone else] asked any questions, nor did [they] dispute any of the facts or conclusions," the University contends.

Moving to the merits of the dispute, the University takes the position that the Grievant's behavior "unquestionably violated workplace standards." According to the University, the investigation clearly disclosed that the Grievant raised "her clenched fist . . . within inches" of her supervisor's face. The University further asserts that Ms. Grieme, by contrast, did nothing to provoke such behavior.

Additionally, the University maintains that the investigation accurately disclosed that the Grievant "willfully" threw her water bottle at a glass wall, endangering the "safety of students, [and] other employees." The University contends that the water bottle was a "32-ounce Eddie Bauer plastic bottle," heavy enough to "create serious damage." The University further contends that the Union "has offered no defense" to the water bottle conduct.

The University responds specifically to what it characterizes as the Grievant's "differing defenses." The University first anticipates that, based on the testimony, the Grievant will contend that she raised her fist in a defensive action. The University argues that the Grievant did not make this claim during the investigation. Rather, according to the University, the Grievant stated that she "looked down, and was surprised to see that her left fist was clenched."

The University further maintains that, in any event, the Grievant's contention is not credible. The University contends that no fact established a need for a "defensive

gesture" and that the evidence establishes that the Grievant's actions were motivated not by fear, but by anger. It was the Grievant who was the "aggressor," the Union asserts, not Ms. Grieme. The University's brief states that:

> Grieme's account clearly states that it was the Grievant, not Grieme, who was yelling and frustrated. Id. The Grievant goes on to imply that Grieme actually egged her on, at which time the Grievant looked down and was surprised to realize that her fist was clenched in a defensive position. Id. If the Grievant was being the aggressor, why would the Grievant need to have her fist in a defensive position?

The University also notes the Union, and not the Grievant, was first to raise the "defensive" action issue, according to its investigation.

The University also responds to the Union's anticipated position that the Grievant clenched her fist because it was a "nervous habit." Again, the University argues that the testimony supporting this contention is "suspect" because it was not offered "until the arbitration itself." In this regard, the University characterizes the failure to offer this evidence in the investigation as an attempt to "ambush" the employer with information it never had a chance to consider.

Additionally, the University contends that the facts supporting this theory are "totally at odds with the account the Grievant created for the Union," because the Grievant's prior position "establish that it was the Grievant, and not Grieme, who was the aggressor in the situation."

To the extent the Union's position is intended to establish that the Grievant did not intend to threaten Ms. Grieme, the University asserts, such a conclusion is "simply not believable." The University takes the position that "Grieme would not have been so shaken three hours later" unless she believed that her safety had been threatened.

The University addresses the Union's objection to its failure to provide copies of the handwritten notes taken during the investigation. The allegation was raised for the first time during the step procedure, the University contends. The CBA does not require the preservation of handwritten notes, the University observes, and the University presented a summary of all of its findings. The University contends that the Union declined to present any contrary evidence at any time.

The University contends the Grievant was not incited by Ms. Grieme and that, between Ms. Grieme and the Grievant, Ms. Grieme is more credible. According to the University, the Union incorrectly contends that Ms. Grieme's comment, "go ahead and do it," as a provocation. Rather, the University takes the position that that Ms. Grieme was merely "attempting to stand her ground and not be bullied."

The University contends that the Grievant is not credible because, during the investigation, she told Ms. Boutang that Ms. Grieme had screamed at her and chased her. This contention was not supported by the facts, according to the University.

Finally, the University contends that the "single day suspension was an appropriate, and arguably lenient, discipline to impose." In support of this position, the University argues that the Grievant was disciplined only for threatening her supervisor, and not for the "coaching on proper interpersonal communications." The University takes the position that "Physical threats cannot be tolerated . . . Rudeness is one thing but actually physically threatening one's supervisor and throwing an almost full 32 oz. shatter-proof water bottle at a glass wall create a situation where serious harm can be done." The University requests that the grievance be denied and that the discipline be upheld in all respects.

The Union

The Union first states its position in the context of the various elements of the just cause standard. The central contention of the Union is that the University "failed to meet Just Cause standards in several substantive areas."

The Union takes up the question of notice. To the Union, the coaching meeting between the Grievant and Ms. Grieme was an event "that could result in disciplinary action." Therefore, the Union contends, Ms. Anderson should have been provided with an opportunity to have a Union representative present with her. The Union takes the position that the Grievant was "unaware" that the real purpose of the break was to conduct a work performance meeting.

Reference is made to what the Union characterizes as Ms. Grieme's "assertion" that the meeting was merely for the purpose of problem solving. "[T]he contractual process should have been utilized," states the Union. It further argues that Ms. Grieme had been recently trained in the "coaching" process, and "knew the correct and appropriate procedures." The Union takes the position that if the University was attempting to change the "standards for the employee's use of email," it should have been done in accordance with the CBA.

The Union questions the fairness of the investigation. Specifically, the Union objects because, in its view, Ms. Lomker "took Supervisor Grieme [sic] recital at face value" and did not look into the "event more deeply, other than the interview of the Grievant." The Union charges that Ms. Lomker was in some degree motivated by Ms.

Grieme's desire to "punish Heather, not for work performance, but for not being as deferential to her [Grieme] supervisory authority as she [Grieme] felt was appropriate."

The Union contends that the "outcome was discussed even before the investigation began." In this regard, the Union asserts that at their initial meeting, Ms. Grieme, Ms. Lomker, Ms. McClasky and later Ms. DeBeau-Melting engaged in a "discussion on how the incident should be addressed, including the appropriate level of discipline." The Union argues that is would have been more appropriate to exclude Ms. Grieme from discussions of this nature. The Union also maintains that Ms. Lomker should have made more than one attempt to contact the Grievant on the day of the incident.

The Union takes the position that the University acted incorrectly when it destroyed the handwritten notes that formed the basis for the final formal investigation report. "The employee has a right to see the evidence against her . . . The evidence existed," declares the Union.

The Union further objects to the failure of the University to arrange for a "neutral" manager to attend the step meetings and the failure of the University to produce Ms. Grieme at the step meetings. Noting the University's position that Ms. Grieme was "too frightened," the Union asserts that Ms. Grieme continued to interact with the Grievant on a daily basis and did not consider reassigning her. "The Employee has a right to confront her accuser," the Union asserts.

The Union further objects to the level of proof offered by the University. In support of this contention, the Union takes the following positions:

- The witnesses disagreed with each other as to what took place.
- Other than the statement of the Grievant, there is no "first person documentation" of the events in evidence.
- In several respects, the statements of the Grievant are confirmed by the University's investigation.
- Ms. Boutang confirmed the Grievant's testimony in several respects, including (1) the Grievant's habit of involuntarily clenching her fist under stress, (2) the Grievant's demeanor prior to the January 13 meeting, (3) the failure of the University to challenge her credibility, (4) there is no evidence that the Grievant held her fist to Ms. Grieme except Ms. Grieme's own statement.
- Ms. Grieme did not testify that she or any other person was in danger from the throwing of the water bottle.
- The University did not produce any other witnesses to the incident.

In the context of these factors, the Union asserts that the University failed to prove that Ms. Anderson threatened Ms. Grieme or placed anyone in danger.

The Union contends that the University did adequately consider that Ms. Grieme used "inappropriate language" to Ms. Anderson. The University did not consider that it was Ms. Grieme who "escalated the incident" by chasing Ms. Anderson down to the hallway.

The Union objects to the penalty on the following grounds:

- The University failed to employ the principle of progressive discipline pursuant to the CBA.

- The University failed to consider Ms. Anderson's work history, including certain awards she has earned, her "clean discipline record and her outstanding performance reviews."
- The University's use of prior events for which no discipline was issued.

In conclusion, the Union believes that the grievance should be sustained "Given the egregious violation of the just cause standards of notice, the biased investigation, withholding of evidence which tainted the Grievant's due process rights, the lack of progressive discipline or consideration of the Grievant's work history.

## Discussion

Conduct Evaluation

The evidence shows that the "coaching session" called by Ms. Grieme was necessary due to Ms. Anderson's reaction to the University's decision to require the students to share equipment. Her reaction was one of frustration and dissatisfaction. She chose to express these points of view in several emails containing discourteous remarks. Ms. Anderson requested that her duties be reduced unless she was provided additional equipment and followed up these electronic exchanges with an apparent refusal to participate with Ms. Grieme in certain job related activities.

Ms. Grieme decided to discuss these events in a non-disciplinary coaching session. As she prematurely walked away from the "coaching" session, Ms. Anderson held her fist within an inch or two of Ms. Grieme's face and threatened her with a physical altercation if the discussion continued. Thereafter, Ms. Anderson threw her water bottle at a nearby window. Ms. Grieme reasonably viewed Ms. Anderson's actions and words to be a threat to her physical safety and well-being.

At the hearing and in its brief, the Union made several contentions challenging several of these facts. For example, the Union contends that Ms. Grieme also displayed an inappropriate amount of anger, as evidenced by her tone and the use of an inappropriate word. The Union contends that Ms. Grieme exacerbated the situation by "running after" Ms. Anderson at the end of the coaching session. While the Union does not dispute that Ms. Anderson's fist was clenched at the end of the session, the Union does take the position that Ms. Anderson did not place it within an inch or two of Ms.

Grieme, as she testified. In this case, however, the record is insufficient to sustain the factual contentions made by the Union.

Both the University and the Union have made successful efforts to accurately and comprehensively review the various elements that must be considered when applying the "just cause" standard, as that term is commonly applied in the collective bargaining context. Experience teaches us that workplaces are centers for producing tensions and conflicts among employees. Disagreements are bound to occur. Bargaining unit members may not always agree with the manner in which an employer has chosen to direct an operation. Supervisors are often called upon to implement an operational decision, whether they agree with it or not. To a point, the occasional harsh word or the infrequent heated dispute is, and should be, tolerated by an employing authority.

Here, Ms. Anderson's conduct at the coaching session warrants discipline because she escalated the meeting beyond the discussion stage. However, while the threat does warrant discipline, the evidence is not sufficient to show that Ms. Anderson's actions endangered any other person or created any specific liability for the University.

The Investigation

The investigation was conducted properly. A review of the various memoranda produced in the investigation indicates that the procedure utilized was fair and complete. All witnesses were interviewed, including Ms. Anderson.

The Union maintains that the integrity of the investigation was compromised because Ms. Lomker's handwritten notes were destroyed after the final documents were

produced. Ms. Lomker was instructed, in accordance with University policy, to destroy these handwritten notes.

"The employee has a right to see the evidence against her," the Union asserts. The Union is certainly a correct in this regard. However, the evidence fails to suggest any reason to question the good faith of the University or the adequacy of the final report. No evidence was produced to show that the University intentionally or unintentionally failed to disclose a pertinent fact. Research has failed to uncover any precedent for a rule that requires an investigating authority to keep and be prepared to produce the inevitable informal notes that are produced in the course of an investigation.

The Penalty

The University's decision on the penalty was a one-day suspension. In support of the propriety of the penalty, the University asserts:

> Grievant engaged in a verbal and physical outburst that violated the standards for conduct in the workplace; created a hostile, threatening, and unsafe atmosphere in the workplace and created liability for the University. The Grievant's behavior warranted termination, and under the circumstances, a one-day suspension was a lenient discipline to be imposed.

The Union contests the penalty. In this regard, the Union asserts that the penalty is too severe in light of, among other things, the Grievant's previous disciplinary history and past performance reviews. The Union also challenges the penalty on the grounds that it is not progressive in nature, as prescribed in the CBA.

The CBA, at Article 22, Section 6, codifies the accords reached by the parties on the subject of corrective discipline. That section provides that a specific "progressive

order of discipline shall apply," except for those occasions when "it will be appropriate to depart from this order." Three progressive steps are set forth. The first category of discipline is an oral warning, which is documented through the use of a "standard University form." The section further provides for a "written warning" and a "notice of suspension." All forms of discipline must specify the "nature of any incorrect work-related behavior" and advise the employee that "non-correction will result in further disciplinary action."

Discharges are dealt with in the next section, Section 7. Pursuant to this provision, an employee may be discharged for several of the violations alleged by the University in this case, including an action which "[E]ndangers the safety of students . . . the public . . . other employees" or causing "a liability for the Employer."

Collective bargaining agreements often contain provisions relating to progressive discipline. At a minimum, the systems of progressive discipline agreed to usually call for some type of warning or suspension prior to the imposition of a more serious penalty. See, e.g., *Great Atlantic and Pacific Tea*, 60 LA 656 (Kabacker, 1973). Regardless of whether provisions similar to Section 6 are in place, employees are expected to know that serious misconduct will inevitably lead to serious consequences.

With regard to their CBA, the parties appear to have agreed to the same basic disciplinary principles that have been historically utilized in many other grievance awards and labor-management relations settings, even in the context of contracts that do have such provisions.

A review of several cases in which employees have been disciplined for this type of infraction disclose the propriety of the discipline is determined on the basis of several

pertinent factors. These factors include whether the grievant was provoked, the length of service, the work record, past disciplinary history, the effect of the conduct on the safety and work of other employees and evidence of emotional instability or dangerous propensities.

The CBA mandates the application of progressive discipline, where "appropriate." An evaluation of the penalty in the context of the pertinent factors and the facts of this case demonstrate that the University's departure from the progressive discipline provisions of the CBA is not supportable on this record.

Ms. Anderson's conduct was not acceptable. There is no evidence that Ms. Anderson's behavior was provoked by Ms. Grieme or any other employee or University action. However, despite the University's contention that Ms. Anderson is a "challenging employee" required repeated coaching, the University concedes that "the Grievant had not been disciplined for performance issues or behavior before." There was no evidence of emotional instability or that the Grievant, a 10 year employee, had ever been disciplined for any reason. Although Ms. Grieme was justifiably upset with Ms. Anderson's behavior on this occasion, the evidence is not sufficient to show that she was actually endangered. Similarly, there is no evidence to show that any other student or member of the public was placed at risk. Based on these factors, some reduction in discipline is necessary.

The Union's Objection to the University's Brief

With its written closing statement, the University included an internet printout containing specifications on the size and capacity of the water bottle Ms. Anderson threw in the corridor. The Union objected to the inclusion of this printout because it was not offered at the hearing. The University contends the Union's objection is without merit because the information is available on the Internet and in the public domain. Additionally, the University argues that it was the Union that questioned the "properties" of the water bottle. The bottle was not placed into evidence, but was available at the hearing for inspection.

The Union's objection must be sustained. Unless both parties consent or some special arrangement is made in advance, all exhibits should be placed into the record in a timely manner at the hearing. Adherence to such a procedure ensures that all parties have the chance to review the exhibits, to make objection where appropriate and to craft a response, where appropriate. This must apply, regardless of whether the exhibit contains information that is available on the Internet or is otherwise in the public domain. Just as the factfinder is not entitled to perform independent research or to consider matters not timely presented by the parties, the parties are obligated to produce testimony and exhibits in a way that promotes proper evaluation and a reasonably opportunity to respond.

Conclusion

Having carefully considered the testimony and exhibits received into evidence, as well as the closing written arguments submitted by the parties, it is Arbitrator's opinion that the University had reason to discipline Ms. Anderson, but that the penalty of a one-day suspension was too severe and not for just cause. The penalty should be reduced to a written warning, pursuant to Article 22, Section 6, Paragraph B.

Accordingly, the grievance is DENIED in part and SUSTAINED in part.

# A W A R D

1. **IT IS THE OPINION AND AWARD** of the Arbitrator that the University of Minnesota, University Libraries had reason to discipline Heather H. Anderson, but did not have just cause to suspend her on or about January 31, 2005.

2. **IT IS THE ORDER** of the Arbitrator that the suspension is reduced to a written warning pursuant to Article 22, Section 6, Paragraph B and that Heather H. Anderson be made whole for any and all losses of wages and benefits.

October 10, 2006
St. Paul, Minnesota

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David S. Paull, Arbitrator